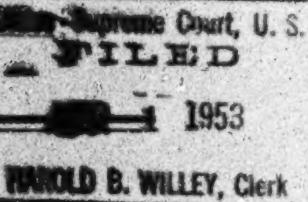


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 88722

THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, A CORPORATION,

Appellant,

v.s.

PUBLIC UTILITIES COMMISSION OF THE STATE
OF CALIFORNIA, AND CITY OF LOS ANGELES, A
MUNICIPAL CORPORATION,

Appellees.

**BRIEF IN OPPOSITION TO MOTIONS TO DISMISS
OR AFFIRM.**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1952.

No. 667

**THE ATCHISON, TOPEKA & SANTA FE RAILWAY
COMPANY, A CORPORATION,**

Appellant.

vs.

**PUBLIC UTILITIES COMMISSION OF THE STATE
OF CALIFORNIA, AND CITY OF LOS ANGELES, A
MUNICIPAL CORPORATION,**

Appellees.

**BRIEF IN OPPOSITION TO MOTIONS TO DISMISS
OR AFFIRM.**

Statements opposing jurisdiction and motions to dismiss or affirm have been filed by the appellees herein, the Public Utilities Commission of the State of California and the City of Los Angeles. This brief is submitted in opposition to these motions, as permitted by Rule 7(3) of the Rules of this Court. The matters referred to in appellees' statements opposing jurisdiction may appropriately be considered under three headings: (1) the basis of the Commission's order; (2) the attempted distinction of the *Nashville* case; and (3) the jurisdiction of this Court on appeal.

1. THE BASIS OF THE COMMISSION'S ORDER.

Appellant pointed out in its Statement as to Jurisdiction that this Court's most recent decision involving the question of the imposition of grade separation construction costs, *Nashville, C. & St. L. Ry. v. Walters*, 294 U. S. 405, stated the principle that under present day conditions assessments laid upon railroads for such improvements are constitutional "only if based on benefits received by them." (*Id.* at 430.) Appellant also pointed out that the Commission not only refused to follow that principle but took pains to assert in its opinion that "we are not bound to follow the benefit theory." Moreover, the Commission attempted to distinguish the *Nashville* case and specifically relied upon several earlier decisions of this Court which, having been decided prior to its recognition of the "transportation revolution," sanctioned the imposition of total grade separation costs upon the railroad. (See Appendix B to Statement as to Jurisdiction.)

In its Statement Opposing Jurisdiction, however, the Commission, without saying so openly, would have this Court infer, nevertheless, that it did give effective consideration to the benefits to the Santa Fe in allocating 50% of the total cost of construction to the railroad. The Commission says to this Court in the section designated "Statement of the Facts":

"The Commission, in adherence to the entire record and in the light of particular facts presented during rehearing, did not subscribe to either of the foregoing contentions of said parties, but stated that '*In apportioning the costs of constructing these separations between applicant (City of Los Angeles) and the railroad company (Santa Fe), due consideration should be given to the obligations of each party, as well as to the benefits derived,*' explaining as follows: * * *."¹

¹ Emphasis is supplied throughout this brief unless otherwise noted.

The Commission repeats this plain representation in support of its argument that "no substantial Federal question is presented," as follows:

"The Commission, in apportioning the costs of constructing the instant grade separation changes between the City and Santa Fe, gave due consideration to the obligations of each as well as to the benefits derived."

These two statements can only be explained as an effort by counsel representing the Commission to shield from judicial review its flat rejection of the benefit principle in favor of an arbitrary 50% assessment, and to make it appear instead that the expense of the structure was in fact allocated on the basis of "the benefits derived." What counsel neglect to tell the Court is that the sentence italicized above appears in the Commission's opinion on rehearing in this case *only as a quotation from its 1932 decision*, which had been relied upon by the Santa Fe as an instance of the Commission's recognition of the benefit principle. The Commission quoted its prior recognition of that principle only to reject it as no longer applicable.² In short, without identifying the quotation, counsel for

² In order that the Court may see the sentence quoted by the Commission in its context in the Commission's opinion, the paragraph in which it appears is reproduced as follows:

"The railroad here contends that the modern development of the law in regard to apportionment of costs in grade separation cases has been toward the allocating of such costs according to the benefits received by the parties involved. In 1932, we are reminded, these same parties were before this Commission in a similar proceeding involving a proposed widening of the same two crossings (Decision No. 25069, dated August 15, 1932, in Application No. 18063, 37 C. R. C. 784). The Commission's order authorized the widening, and held that the costs should be borne 25 per cent by The Atchison, Topeka & Santa Fe Railway Company and 75 per cent by applicant. The Commission then said, '*In apportioning the costs of constructing these separations between applicant and the railroad company, due consideration should be given to the obligations of each party, as well as to the benefits derived.*' However, this record discloses that material changes

the Commission have indicated to this Court that its 1932 statement represents the basis of its present order, whereas in fact that basis was specifically rejected.

So that there may be no possible doubt about the real basis of the Commission's order, this Court may take notice of the fact that since its decision in this case the Commission has again assessed exactly 50% of the cost of a new grade separation against the railroad involved (the Southern Pacific Company). The significance of this subsequent decision lies in the fact that the Commission treated its action in the instant (Santa Fe) case as establishing a *rule of law* that benefits to the railroad need not be considered in allocating grade separation costs. The Commission there said:

"While the railroad contended that the costs should be assessed according to the so-called 'benefits' theory, we affirm our holding in Decision No. 47344, dated June 24, 1952, on Application No. 29396 [the instant case], wherein it was held that the authority of this Commission to allocate costs stems primarily from Section 1202 of the Public Utilities Code and is an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. Therefore, we are not bound to follow the so-called 'benefits' theory. * * *"
City of Glendale, Los Feliz Underpass, 51 Cal. P. U. C. 788, 795-6.

The Commission itself has thus interpreted its decision in the instant case as resting not upon any appraisal of benefits to the railroad but upon its asserted authority, under the police power, to allocate costs as it chooses with-

have taken place in conditions at the present time as compared to those in 1932. As we said in Decision 43774, *supra*, "The great increase in population and the tremendous increase in motor vehicle traffic present a new problem." (Appendix B to Statement as to Jurisdiction.)

out constitutional limitation. A reading of the Commission's opinion will leave the Court no doubt of that fact.

The twisting and turning which counsel now finds to be expedient in stating the Commission's position as to the application of the benefit principle is highlighted by this language in its Statement in Opposition:

"The Commission, in apportioning the cost of constructing the instant grade separation changes as between the City and the Santa Fe, [1] gave due consideration * * * to the benefits derived. * * * there is [2] no logical or legal basis for the contention that the costs of the instant Washington Boulevard grade separation improvement be borne by the parties respectively in accordance with the benefits to be derived by them [3] nor are any such benefits mathematically calculable. By the great weight of judicial decision above cited, [4] the element of direct benefit is absolutely immaterial. As stated by the Commission [5] it is one of the factors for consideration but [6] not necessarily the controlling factor."

The Commission thus argues here that it "gave due consideration * * * to the benefits derived"; that "there is no logical or legal basis" for the benefit theory; that such benefits are not "mathematically calculable"; that they are "absolutely immaterial," and that the Commission has recognized benefits received to be a factor for consideration but not necessarily the controlling factor. In stating its reasons for taking the action which is the subject of this appeal, the Commission disdained such circumlocution by forthrightly declaring that since it was exercising police power it was not bound to follow the benefit theory. But it has been something less than candid in its representations to the Court.

I. THE ATTACHED MEMORANDUM OF THE NASHVILLE CASE.

Both appellants seek to characterize the Court's *Nashville* decision as "a simple, uniform, and distinguishable case," to be limited in its application to grade separations constructed in rural areas and in connection with inter-city highways financed with federal-aid funds. Since the grade separations here involved lie within the limits of Los Angeles, and no federal funds are to be used, the constitutional principles stated in Mr. Justice Brandeis' opinion for the Court are said to be irrelevant.

We think the process of interpreting and applying Supreme Court decisions is not so shallow and unrewarding. Of course the Court addressed itself to the facts then before it, and of course this is a different grade separation. The important question—the question to which appellees fail to address themselves—is what circumstances present in the *Nashville* case led this Court to depart from a line of decisions which had sanctioned the imposition of total costs upon the railroads and to adopt a new approach to the problem by relating the allocation of costs to benefits received.

Appellant believes that this question can be resolved only after careful study of the problem upon full briefs by the parties. As a suggestion of the direction of the investigation, however, the Court should consider this statement by Mr. Justice Brandeis, with which he began his consideration of the principal issues presented in the *Nashville* case:

"* * * The charge of arbitrariness is based primarily upon the revolutionary changes incident to transportation wrought in recent years by the widespread introduction of motor vehicles; the assumption by the Federal Government of the functions of road builder; the resulting depletion of rail revenues; the change in the character, the construction and the use

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of highways; the change in the cost of living for elimination of grade crossings; in the number of such eliminations; and in the value of land taken therefor; and the change in the relative responsibility of the railroads and vehicles moving on the highways as elements of danger and causes of accidents." 304 U. S. at 415.

Each of these "revolutionary changes" has been progressive in the years since that decision. California's network of multi-lane superhighways, of which Washington Boulevard is an important link, connects with, supplements and feeds the constantly expanding system of federal and state highways and thus has had an accumulative effect upon the railroads, identical in character with that of the federal highway program of the 1930s. The factors stated by the Court are precisely those on which appellant made its record below and now bases this appeal. There is much greater reason now than in 1935 to hold that an order allocating costs must not be arbitrary, because the considerations enumerated above have multiplied in force and impact.

To indicate briefly how the underpasses to be built on Washington Boulevard will serve the truck and commercial traffic with which the railroads must compete, just as in the case of the underpass involved in the *Nashville* case, it may be pointed out that the City's own traffic engineer testified that Washington Boulevard is a "primary" or major highway and that the widening of the instant underpass is designed to permit use of Washington Boulevard as a feeder for such new cross-country super highways, as the Santa Ana Freeway. Even at the present time, Washington Boulevard is a main arterial highway crossing Los Angeles in a east-west direction. On the west, it connects with U. S. Highway 101 and serves the Los Angeles harbor area; on the east, it connects with

state and federal highways carrying traffic to the north, east and west.

The intersection of Washington Boulevard with Alameda Street, just west of the railroad underpass, was referred to by a witness for the City as the "hub of gravity" for truck traffic serving the Los Angeles Harbor and industrial area. From that focal point, the City's witness stated that truck traffic moves to the "four winds and to the hinterland." At present, about 3,000 trucks and 3,000 cars use the Washington Boulevard underpass daily, and the purpose of the proposed new underpass is solely to facilitate and increase the use of Washington Boulevard by trucks, buses and other motor vehicles now using other highways, including Olympic Boulevard, State Route 26, to the north.

The City fails to mention that an important feature of the proposed grade separation is an increase in the height or clearance of the present underpass. The City's traffic expert testified that the need for higher vertical clearance arises entirely because of truck traffic. That witness also testified that the greater percentage of large trucks now using Washington Boulevard are engaged in through traffic between San Francisco, Portland and other points and the Los Angeles industrial area and harbor.⁸ Many other large trucks now avoid the Washington Boulevard underpass but would use the proposed underpass. In addition to this increase in the cost of the project to allow greater vertical clearance for large trucks, further increases in cost result from the especially wide lanes required to facilitate the unusually large number of trucks and buses for whose use the proposed underpass is designed. A basic purpose of the improvement is to speed this competitive traffic and so reduce the cost of handling.

⁸As pointed out in appellant's Statement as to Jurisdiction, in 1949 the railroads handled only 20.9% of California intrastate freight business, the trucks 73.7%.

Thus, the differences in facts asserted by appellant indicate no more than that the grade separation in the Nashville case was designed to benefit the railroad's movements in open country, whereas the Washington Boulevard project is designed to benefit the movement of the same type of traffic in and out of its terminal in this instance the City of Los Angeles. The situation will be an important improvement in the terminal facilities of appellant's motor competitors, just as the separation in the Nashville case constituted an improvement in their main line facilities.*

The Commission presumably advances as further criticism of the *Nashville* case the observation: "nor are any such benefits immediately calculable." The exercise of the numerical judgment as to "benefits received" which that decision requires is not dependent on the use of any mathematical formulae, as the Commission well knows. As to the practical application of the *Nashville* rule, it is sufficient to note that the Commission itself applied the benefits principle without difficulty for 10 years, and that the Stanford Research Institute report referred to in appellant's Statement as to Jurisdiction commends its use.

4. THE JURISDICTION OF THIS COURT ON APPEAL.

The City of Los Angeles argues at some length that an appeal was not properly taken to this Court because a state "statute" is not involved. The argument is made that, whereas the portion of the Commission's order authorizing construction of the grade separation is legislative

* There is no question in this case as to appellant's "right to relitigate factual questions" (Commission's Statement in Opposition). The facts here discussed by appellant were placed in evidence by the City as well as appellant and stand uncontested in this record. The only issue in this case is the Commission's express refusal to apply the benefit principle to the uncontested facts, as required by the *Nashville* case.

in nature and is thus a "statute" within the meaning of Title 28 U. S. C. Section 1257(2), the portion of the order authorizing courts to restrain its execution and is not a "statute" as that term is used in this connection. The City concedes that since the Court of Appeals made the erroneous classification of order, it cannot properly appeal from the judgment authorizing the Commission's order. The contention however is the friable.

In *Prentis v. Atlantic Coast Line*, 211 U. S. 210, 222, this Court, through Mr. Justice Holmes, stated the basic distinction between legislative and judicial acts as follows:

"A judicial inquiry investigates, declares and enforces liabilities as they stand at present or past facts and were then supposed already to exist. That is its function. And another function, on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subjects of its power."

The City concedes that that part of the Commission's order authorizing construction of the grade separation is legislative in nature but argues that, chameleon like, the Commission changes color in the middle of its determination and becomes a judicial body enforcing established liability.

We submit that such a contention does violence to the basic distinction referred to in the *Prentis* case. It should be emphasized that Mr. Justice Holmes identified the judicial function with the enforcement of liabilities "under laws supposed already to exist." The City's argument loses all force once it is conceded that the Commission's order authorizing this particular grade separation was legislative in character. The single Commission order

* *Ross v. Oregon*, 227 U. S. 150 (1913), the only decision of this Court cited by the City on this point, is inapposite. The question there considered was whether a decision by a state court in a criminal case was an *ex post facto* law where the court had con-

appealed from here reflects our legislative power—the establishment of a new rule relating to the grade separations in question, expressly including a direction as to how the expense incident thereto shall be borne.

That, certainly, is the Commission's view. In its decision on rehearing in this case (Appendix B to Statement as to Jurisdiction), the Commission said first:

"The authority of this Commission to allocate costs, as designated in Section 1722 of the Public Utilities Code, arises in an exercise of the police power on the part of the State of California through the medium of its agency, the Public Utilities Commission. We hold that the law is well established that under the exercise of the police power a state may regulate the crossings of railroads with its highways, and may require grade separations to be erected and maintained, apportioning the costs in the exercise of its sound discretion."

And in its Statement Opposing Jurisdiction filed in this Court the Commission says:

"We steadfastly contend that the orders of the Commission constitute a valid and reasonable exercise of the police power without impairment of any obligation or right whatsoever of Santa Fe. * * *."

It is not surprising, therefore, that the Commission does not join ~~the~~ City of Los Angeles in contending that this appeal involves solely the exercise of judicial power.

Finally, this Court has always considered state commission orders of this kind as involving legislative acts. In *Grand Trunk Ry. v. Indiana R. R. Comm.*, 221 U. S. 400, a state commission order allocating costs of grade crossing protective devices was involved. There, as here, there

strued a state constitutional amendment as not repealing the statute upon which the prosecution was based.

was no claim that the Commission had not properly authorized the construction but only that the portion of the order allocating costs was unconstitutional as abrogating a contract between two railroads involved. This Court said:

"Observing first, that the order is a legislative act by an instrumentality of the State exercising delegated authority (*Pennia v. Atlantic Coast Line Co.*, 211 U. S. 210, 226), is of the same force as if made by the legislature, and so is a law of the State within the meaning of the contract clause of the Constitution [citations], we come to consider whether it does impair the obligation of the contract." 221 U. S. at 403

It is thus plain that this Court has not recognized the theory relied upon by the City."

CONCLUSION.

Of the three asserted grounds for dismissing this appeal or affirming the judgment of the state court, appellees are together on only one—that somehow the *Nashville* case is to be distinguished from the situation here presented, which is to be governed by decisions antedating that case and permitting the assessment of the full cost of grade separation construction upon the railroad. We believe that a reading of this Court's opinion will demonstrate that Mr. Justice Brandeis' detailed exposition of the "revolution" in the relation between rail and highway traffic was of import and significance for the future, notwithstanding the irrelevant dictum of "a single unique case," as appellees maintain.

* If the present appeal were improvidently taken. 28 U. S. C. Section 2103 provides that this Court shall consider the appeal under such a petition for certiorari.

It is respectfully submitted that probable jurisdiction
should be noted.

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